SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1258

LAWRENCE DEMANGONE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Regulations Involved	2
Statement of the Case	2
Reasons For Granting the Writ	3
Conclusion	8

Table of Citations.

Cases.

Bates v. Little Rock, 361 U. S. 516	3
Fourco Glass Co. v. Transmirra Corp., 353 U. S. 222	6, 7
Gore v. United States, 357 U. S. 386	8
Griswold v. Connecticut, 381 U. S. 479	6
Union Pac. Ry. Co. v. Botsford, 141 U. S. 250	4
United States v. Laub, 385 U. S. 475	6
United States v. Miller, 367 F. 2d 72 (2 Cir. 1966), *cert. denied* 386 U. S. 911	7
United States v. O'Brien, 391 U. S. 367	3, 4, 5, 7, 8

Statutes.

Military Selective Service Act of 1967, 50 U. S. C. App.	2
Section 12 (a)	2, 6, 7, 8
Section 12 (b)	5, 6, 7, 8

Regulations.

32 C. F. R. 1623.5	2
32 C. F. R. 1642 et seq.	7

Miscellaneous.

Landis—South African Apartheid Legislation II, 71 Yale L. J. 437 (1962)	5, 6

Jurisdiction

The judgment of the Court of Appeals was entered March 3, 1972. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

I. The Fifth Amendment protects petitioner from being required to personally possess a Classification Certificate.

II. If the non-possession of a Classification Certificate is a crime, it is only a crime under Section 12(b) (6), not under Section 12 (a).

Statutes and Regulations Involved

Military Selective Service Act of 1967, 50 U. S. C. App. Section 462 (a) and 462 (b) are set forth in the Appendix, *infra*, pp. 17a, 18a.

Selective Service Regulation 32 C. F. R. 1623.5 is set forth in the Appendix, *infra*, p. 20a.

Statement of the Case

Petitioner was indicted on counts of refusing to report for induction and for failing to keep a current, valid classification certificate in his personal possession on April 15, 1970. Petitioner was tried in the District Court by Judge Weis without a jury and acquitted on April 21, 1971 of violating Section 10 of the Military Selective Service Act of 1967, 50 U. S. C. App. 462 in that he was illegally classified 1-A and ordered for induction. Petitioner, however, was convicted on April 21, 1971 of violating Section 12 (a) of the Military Selective Service Act of 1967, 50 U. S. C. App. 462(a) in that he did fail and neglect to have in his

personal possession a current, valid classification certificate on April 15, 1970. A sentence of 6 months, 3 years probation and a $3000 fine was imposed on Petitioner.

The Court of Appeals on March 3, 1972 affirmed the District Court dismissing the issues Petitioner raises in this Petition For A Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. The Fifth Amendment protects petitioner from being required to personally possess a classification certificate.

This Court in *United States v. O'Brien*, 391 U. S. 367 was careful to state that *O'Brien* did not deal with the non-possession regulations.

> "[W]e are not concerned here with the non-possession regulations, it is not inappropriate to observe that the essential elements of non-possession are not identical with those of mutilation or destruction." 391 U. S. at 381.

This case, however, deals with the non-possession regulation. Petitioner respectfully submits that the non-possession regulation is an invasion of his constitutional right of liberty to control his own person and be free from governmental restraint.

When seeking to abrogate or diminish a basic personal freedom, the government must demonstrate a substantial burden of justification. *United States v. O'Brien*, 391 U. S. 367 and *Bates v. Little Rock*, 361 U. S. 516. In *Bates*, this Court stated:

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." 361 U. S. at 524.

The right of the individual to be free in his person has long been recognized. *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250. In *Union Pac. Ry. Co.*, this Court stated:

> "No right is held more sacred, or is more carefully guarded, by the common law, then the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'
>
> As well said by Judge Cooley: "The right to one's person may be said to be a right of complete immunity; to be let alone." 141 U. S. at 251.

"Liberty" would seem to be an incomplete protection if the government can require a registrant to carry on his personal possession at all times a classification certificate especially where there are many practical means of achieving the same ends without restricting the individual's liberty.

In recognition that the government must first look to the alternative before it seeks to restrict a registrant's freedom, this Court in *O'Brien, supra*, stated:

> "We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction." 391 U. S. at 381.

Unlike *O'Brien*, here it is difficult, if not impossible to define what governmental interests are served by requiring registrants to have in their personal possession at all times classification certificates and which of these interests can not be served by means less at odds with long standing notions of personal liberty. O'Brien was convicted when he "deliberately rendered unavailable his reg-

istration certificate, he willfully frustrated this governmental interest." 391 U. S. at 382. That governmental interest was "[T]o insure the continuing availability of issued certificates" which serves "a legitimate and substantial purpose in the system's administration." 391 U. S. at 378. A registrant's classification card does not have to be in his personal possession at all times to be available to the registrant. In the instant case there is no evidence that petitioner's classification certificate was not available to him.[1]

That the non-possession regulation is unconstitutionally overbroad is dramatically demonstrated by its application to an individual's daily behavior. Few registrants have places in their swimming suits to carry a classification certificate—at least without getting it wet if they go swimming—thereby multilating the classification certificate in violation of Section 12·(b) (3). Some registrants do not wear pajamas with pockets. The impossibility of a registrant carrying in his personal possession at all times a classification certificate dictates that such a regulation is unconstitutionally overbroad.

The right to determine what one carries in his personal possession is protected by the Fifth Amendment. The non-possession regulation amounts to requiring American males to carry an "internal passport". *Cf.* Discussion of South Africa's "pass laws" in Landis—South African Apartheid

[1] It is clear, from the record someone turned in a card (Not necessarily a valid, current classification certificate) to Monsignier Rice. It is also clear from the record that this card was not turned in by Monsignier Rice to the government. It would then appear that Monsignier Rice retained possession of this card and would tender this card back to the person who initially relinquished it upon request. In any event, the government failed to prove that the card was unavailable to the individual who initially turned the card over to Monsignier Rice.

Legislation II, 71 Yale L. J. 437, 457-462 (1962). Moreover, for the government to require a registrant to carry a classification certificate at all times in his personal possession amounts to a governmental intrusion upon his body integrity, an interest protected by the Constitution. *Cf. Griswold v. Connecticut*, 381 U. S. 479.

II. If the non-possession of a classification certificate is a crime, it is only a crime under Section 12(b)(6), not under Section 12(a).

Petitioner respectfully submits that the decision in the Court below conflicts with this Court's decisions in *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U. S. 222 and *United States v. Lamb*, 385 U. S. 475.

If petitioner could have been indicted and convicted for failing to personally possess his classification certificate, it would have been under Section 12(b)(6).

Section 12(b)(6) specifically makes "[non-] possession of such certificate" a crime.

Section 12(a) is only a general delegation of power. This Court has held "Specific terms prevail over the general in the same or another [civil] statute . . ." *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U. S. 222, 228-229. Criminal statutes certainly must be more strictly construed than a civil statute. *United States v. Lamb*, 385 U. S. 475, 480. Therefore, Section 12(b)(6) must prevail over Section 12(a), precluding an indictment and prosecution for non-possession under Section 12(a).

The court below erroneously held that "A registrant's non-possession of SSS Form 110 is clearly a crime under the wording of *either* Section 12(a) or Section 12(b)(6)." (Emphasis added.) Slip Opinion, p. 7.

Petitioner submits that Section 12(a)'s generalized prohibition against failing, neglecting or refusing to perform any "duty" under the Act or regulations, which language was also used in 32 C. F. R. 1642 *et seq.* as the basis for the delinquency power, does not create a non-possession offense. Section 12(a) could not be said to create a crime which the government has consistently claimed and some courts have held, was created by Section 12(b)(6). *United States v. Miller*, 367 F. 2d 72, 75 (2 Cir. 1966), *cert. denied*, 386 U. S. 911; *O'Brien v. United States*, 376 F. 2d 538 (1 Cir. 1967), *rev'd* on other grounds, 391 U. S. 367. If non-possession is a crime, it is only because Section 12(b)(6) makes it so, and this under accepted canons of statutory construction:

> "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . Specific terms prevail over the general in the same or another statute which might otherwise be controlling.'" *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U. S. 222, 228-29.

In the instant case, this Court is confronted with a "question as to multiple punishment."[2] Certainly, Congress can

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[2] In *United States v. O'Brien*, 391 U. S. 367, this Court stated:

> "In the absence of a question as to multiple punishment, it has never been suggested that there is anything improper in Congress' providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest. Compare the majority and dissenting opinions in *Gore v. United States*, 357 U. S. 386 (1958). Here, the preexisting avenue of prosecution was not even statutory. Regulations may be modified or revoked from time to time by administrative discretion. Certainly, the Congress may change or supplement a regulation.
>
> Equally important, a comparison of the regulations with the 1965 Amendment indicates that they protect overlapping but not identical governmental interests, and that they reach somewhat different classes of wrongdoers." (Footnote omitted) 391 U. S. at 380.

provide alternative statutory avenues of prosecutions as Congress did in *Gore v. United States*, 357 U. S. 386, cited in *O'Brien, supra*. Gore was convicted of six different crimes each consisting of different elements. The court below held, however, that Congress made two crimes consisting of the *same* elements out of one act.

Under well established canons of statutory construction certainly Congress would have to be more explicit in its legislation than in the instant case to support the court below in holding that the non-possession of a classification card is a crime under 12(a) as well as under 12(b)(6).

Conclusion

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the United States District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 70-227 Criminal

UNITED STATES OF AMERICA,

vs.

LAWRENCE DEMANGONE.

MEMORANDUM AND ORDER.

Defendant was indicted on counts of refusing to report for induction on May 19, 1970 under the provision of the Selective Service Act and also for failing to keep his classification notice in his possession.

In a former criminal proceeding the defendant was found guilty of refusing induction in the armed forces on October 16, 1968. The conviction was reversed by the Court of Appeals which denied rehearing on February 19, 1970 and entered final judgment on February 27, 1970. The Government did not petition for certiorari.

Acting on inaccurate information received on February 11, 1970 to the effect that the Supreme Court had affirmed the decision of the Court of Appeals, Local Board No. 167 in Greensburg, Pennsylvania began the process of reclassifying the defendant as 1-A. The Board meeting on March

17, 1970 voted to put the defendant in 1-A and notice was duly sent to him. This action occurred before the expiration of the 30 day period in which the United States could have applied for certiorari to the Supreme Court.

On April 6, 1970 the local board received a copy of the letter from the Department of Justice advising that it was closing its file. No copy of the letter was sent to the defendant or his counsel.

On April 21, 1970 the defendant was advised to report for induction on May 20, 1970 but he failed to appear.

The defendant contends that the reclassification and Order to appear for induction were illegal because the process commenced while the former criminal prosecution against this defendant was still continuing.

It is necessary to review briefly the activity which occurred in this case before the first prosecution.

On February 1, 1968 the defendant sent a letter to Local Board No. 167 enclosing his registration certificate and advising that he was rejecting the war in Vietnam "and all wars." His letter went on to say:

> "I sincerely believe that if I would keep my Registration Certificate I would, by my silence, be an accomplice to the crimes against humanity which this war has produced.
>
> "According to my conscience, which I believe that I am primarily responsible to, I can not remain silent. My silence to date is inexcusable. I believe that this war is immoral, and also that conscription is an unjust 'law'. It is wrong to call upon men to murder their brothers against their will, and even if others did give their consent, this is not reason enough for me to do the same nor to be a silent accomplice to military crimes."

Opinion of the United States District Court.

Upon receipt of this letter, the local board classified Demangone as a delinquent, changed his student deferment classification to 1-A, and ordered his induction.

There is nothing in the record to reflect that any action was taken by the local board up to and including April 20, 1970 to pass upon the claim of conscientious objection which might fairly be said to be within the wording of the letter of February 1, 1968.

According to Local Board Memorandum No. 41 issued November 30, 1951, as amended July 30, 1968, and not rescinded until August, 1970:

> "A registrant should be considered to have claimed conscientious objection to war if he has signed * * * or if he has filed any other written statement claiming that he is a conscientious objector."

The Memorandum says also:

> "The local board will make every effort to secure a completed Special Form for a Conscientious Objector (SSS Form 150) from each registrant who signs Series VIII of the Classification Questionnaire (SSS Form 100) or who has filed a written statement claiming he is a conscientious objector. However, the absence of an SSS Form 150 does not preclude consideration of all the other evidence in the cover sheet to support the claim.
>
> "b. If, upon consideration of this evidence, the local board determines that it cannot grant the 1-A-O or 1-O classification claimed, the local board should invite or request registrant to meet with it for an interview prior to classification."

The local board never carried out any of these steps nor was the defendant ever advised that a claim for conscien-

tious objection had been considered, accepted or rejected. It is true that the defendant did not answer the forms requesting information which were sent to him in February of 1970 nor did he appeal from the 1-A classification in March of 197 . Nevertheless, we hold that a motion for acquittal must be granted because of a combination of the two factors, namely, the apparent oversight of the board to treat the letter of February 1, 1968 as a claim for conscientious objection and also the fact that reclassification procedures were instituted before the termination of the criminal prosecutions under circumstances which might cause confusion to the defendant. It is not necessary and we therefore do not decide if either situation standing alone would require dismissal but the combination does invalidate the Induction Order.

The very recent case of *United States v. Speicher*, ____ F. 2d ____, Slip Opinion 19,177, 3rd Cir., March 11, 1971 holds that since neither the local board nor the appeal board states its reasons for denying a conscientious objector claim, the Induction Order cannot stand.

We are aware that the Government contends that no formal claim was filed but as the Court of Appeals for this Circuit indicated in *United States v. Turner*, 421 F. 2d 1251, page 1255:

> "* * * when a registrant indicates, no matter how unclearly, a desire for a procedural right, it is the duty of the board to construe it in favor of the registrant and if need be to obtain clarification from him. The supply to a registrant of a requested Form 150 is a mandatory duty of the board and the failure to perform this duty will vitiate a conviction for failure to report for induction."

In the *Turner* case there had been an interview with the defendant with the board but despite that the Court of Appeals said:

> "Nor is there either indication in the record or a contention by the Government that at this interview the board made any effort to seek out whatever information the defendant might have had." (p. 1256)

In the case at bar there was never even an interview or request for further written information.

The dismissal of this count in no way precludes the Board from again ordering the defendant to report for induction if the conscientious objector classification is denied after the required procedures have been followed.

In accord, see *United States v. Shermeister*, 425 F. 2d 1362 (7th Cir. 1970); *United States v. Holmes*, 426 F. 2d 915 (2nd Cir. 1970); *United States v. Broyles*, 423 F. 2d 1299 (4th Cir. 1970); *United States v. Fraiser*, 314 F. Supp. 1262 (D. C. Arizona 1970).

With respect to the other count of the indictment, that of failing to have possession of the classification notice, the Government has proved its case. An agent of the Federal Bureau of Investigation testified that on June 11, 1970 he interviewed the defendant who said that he had given his classification form to a named speaker at a peace rally. The agent *also stated* that Demangone *did not have the card in his possession when asked on the date of the interview.*

By way of corroboration, the prosecution presented the testimony of Wyndle Watson, a newspaper reporter whose admissible evidence established that a peace rally was held

at the time and place set out in the defendant's statement to the FBI and that an unidentified young man ostensibly gave a card or piece of paper to the identified speaker on the program. The remainder of the witness' testimony was hearsay and not therefore considered as evidence bearing on the case.

The admissions of the defendant made to the agent of the FBI were corroborated therefore in several significant aspects and constitute adequate evidence to sustain a finding of guilt.

Defendant claims that his rights under the *Miranda* decision were violated but shortly before the interview was had with the agent, the defendant signed a written waiver of his rights which was introduced into evidence. At that time he was accompanied by his attorney who witnessed the defendant signing the waiver and who was present in another office while the interview took place. Under these circumstances, the waiver of the Constitutional Rights by the defendant was made knowingly and voluntarily.

Appropriate Orders will be entered.

Order of Court

AND NOW, to-wit, this .... day of April, 1971, IT IS ORDERED THAT:

1. A finding of guilty is entered as to the first count.

2. The motion for acquittal is granted as to the second count.

.....,
United States District Judge.

cc:
Allan H. Cohen, Esquire
Kathleen Kelly Curtin, Esquire
Assistant U. S. Attorney

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1658.

UNITED STATES OF AMERICA,

v.

LAWRENCE DEMANGONE,

Appellant.

(D. C. Criminal No. 70-227.)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued November 19, 1971

Before BIGGS, ADAMS and ROSENN, *Circuit Judges.*

BIGGS, *Circuit Judge.*

The defendant appellant Demangone was indicted for failure to keep his classification notice in his possession. The Grand Jury charged: "That on or about the 15th day of April, 1970, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendant, Lawrence Demangone, being, in pursuance of the Military Selective Service Act of 1967, a registrant with Local Board

No. 167 at Greensburg, Pennsylvania, unlawfully, wilfully and knowingly did fail and neglect to perform a duty required of him by the said Act and the rules, regulations and directions issued pursuant thereto, in that the defendant did fail and neglect to keep and retain in his possession his Classification Notice, Selective Service System Form No. 110. In violation of Title 50 Appendix, United States Code, Section 462(a).[1]

I

At a peace rally held in Point Park by Monsignor Rice on April 15, 1970, Wyndle Watson, a reporter of the Pittsburg Press, stated: "Monsignor Rice was on the stand at the time, and the best I can recall he said he had somebody to introduce, and I believe he said something to the effect that 'many of you know him, have met him before,' or something to that effect, and introduced a young boy. I believe he called him Larry, or called him Lawrence Demangone, and he took the microphone at that time and indicated that this was the second draft card that he had given up. He said, 'They sent me another one, and I have no further use for it,' and he turned over what he identified as his draft card to Monsignor Rice."

The following questions and answers follow in the transcript, the questions being asked by Assistant United States Attorney Kathleen Curtin:

> "Q. Would you proceed?
> A. . . . [H]e identified himself as Lawrence Demangone.

[1] A previous appeal by Demangone was before this court at 419 F. 2d 762 (1969, rehearing denied 1970).

Q. He identified himself as Lawrence Demangone?

A. He was introduced—sorry—as Lawrence Demangone. I am not sure, but I might have talked to him later. I am not positive. I got the spelling of his name somewhere. I would assume that in normal procedure I would have talked to him when he stepped down from the stage to get the proper spelling of his name and where he was from.

Q. Do you recall what he said at the time?

A. . . . I don't have the clipping. I am sure I quoted him to the effect that they sent him another draft card and he still didn't have any need for one, something to this effect, and he turned it over to Monsignor Rice. I didn't see the card. The card wasn't destroyed in my presence.

Q. Did he at that time make any other reference to any other persons?

A. He mentioned about being in Federal Court with another person previously. I think he referred to it as 'a year ago.'

Q. Did he at that time identify this as his draft card?

A. Yes.

Q. How far away were you standing from this person?

A. Ten, fifteen feet, I would say.

Q. What did he do with his draft card?

A. He turned it over to Monsignor Rice.

Q. Did Monsignor Rice accept it?

A. Yes.

Q. Can you identify the person?

A. I have seen this young man here, but I could not sit here and say from an appearance a year ago it was him, and there were a lot of people there. No, I wouldn't say this is definitely the man.

Q. However, you were present when he was introduced as Lawrence Demangone?

A. Yes.

* * *

By the Court:

Q. What did you see turned over to Monsignor Rice?

A. It was a card that was the right size for a draft card, but it was identified as his draft card. I didn't get a close look at it."[2]

At a later point Watson testified as follows, the questions again being asked by Mrs. Curtin:

"Q. Mr. Watson, I have here the Pittsburgh Press dated Thursday, April 16, 1970. I refer you to page 2 and ask whether or not you wrote the article concerning 'Life Gets Priority in Parole Hearing'?

A. Yes, it has my name.

Q. Do you recall writing that article?

A. Yes.

Q. Using that then to refresh your recollection, would you glance at that article and tell us whether or not you can recall the exact words used by Lawrence Demangone in the part where you saw him turn in what he purported to be his classification card.

A. Yes.

* * *

Q. Mr. Watson, if you have reviewed that article, could you tell us whether or not you can recall the exact words used by Mr. Demangone?

A. I have a quote here, which thing I am very careful of. If I don't have the exact words, I will paraphrase without quoting, but I have Lawrence Demangone as saying, 'About a year and a half ago David Worstel and myself appeared in Federal Court for the first time. I recently got this new draft card and I still have no use for it.' After showing the draft card, he turned to Monsignor Rice at that time."[3]

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[2] Transcript at 80-82.

[3] Transcript at 100-101

Opinion of the United States Court of Appeals.

On June 11, 1970 Demangone made certain admissions to FBI Agent Hendon which amounted in substance to a confession. There is no substantial issue as to the voluntariness of these admissions. Agent Hendon testified, again the questioning being by Mrs. Curtin:

> "Q. Will you tell us after this [Miranda warning] form had been signed what took place?
>
> A. I . . . explained that I wanted to talk to Mr. Demangone regarding possible selective service violations, and told Mr. Demangone I wanted to talk to him without the presence of his counsel, and that his counsel could wait outside the room, and that if he wanted to confer with counsel at any time during the interview, he was perfectly free to do so, and that he was not under arrest, and he could leave at any time he wanted to. Then I began the interview.
>
> Q. All right. Would you proceed with the interview?
>
> A. Yes. May I refer to my notes?
>
> Q. Yes.
>
> A. I asked Mr. Demangone where he was registered with the selective service system, and he told me he was registered with the system at Local Board 167 in Greensburg. He said that on April 15, 1970 at a peace rally at Point Park in Pittsburgh, Pennsylvania, that he turned in his selective service classification card which classified him 1-A, turned it over to Monsignor Charles Owen Rice.
>
> He said that he telephonically contacted Monsignor Rice approximately two days before the 15th and asked Monsignor Rice if Monsignor Rice would take the card, and Monsignor Rice said he would.
>
> At that time Mr. Demangone was asked if he had in his possession a selective service card, and he said he did not have such a card. He said he turned in his selective classification card to Monsignor Rice on April 15, 1970.

He further said that he was ordered to report by Local Board 167 of Greensburg, Pennsylvania, for induction into the military service on April 19, 1970. Mr. Demangone said that he proceeded to Local Board 167 in Greensburg, Pennsylvania, on that date, but did not proceed from Greensburg to Pittsburgh for induction.

The Court: What is the date on that report?

A. April 19, 1970. He said he went to the local board on that date, but did not proceed from Greensburg to Pittsburgh for induction.

By Mrs. Curtin:

Q. Did he explain to you why?

A. He said that the failing to report for induction in Pittsburgh and turning in his selective service classification card were both symbols of his protest against the war in South East Asia.

Q. Was there anything further?

A. Nothing that I can recall."[4]

The most important issue raised by Demangone is, is there sufficient independent evidence to corroborate Demangone's confession and to prove the *corpus delicti*. See *Opper v. United States*, 348 U. S. 84 (1954) and *Smith v. United States*, *id.* at 147. See also Wright, Federal Practice and Procedure, Criminal § 414 at 165 *et seq.* It is clear that the evidence given by Watson was hearsay insofar as it relates to the identification of the individual who passed a card about the size of a draft card to Monsignor Rice. There is no physical description of Demangone in the record and therefore no basis of comparison as to size or other details of his appearance so that some basis of comparison could be had with the individual who gave a card to the priest. Nor is there any physical description given by Watson as to the person who did pass a card to

[4] Transcript at 87-89

Rice. Nonetheless, in the absence of proof of an elaborate, deliberately conceived Machiavellian plot and in the light of the fact that the acts which took place admittedly at Point Park do remarkably match Demangone's confession, we are constrained to hold that there is proof that Demangone did turn his card over to the priest at the peace rally; or at the least, the conclusion of the trial Judge that there was sufficient corroboration both of the confession and the proof of the *corpus delicti* is not clearly erroneous. Rule 52(b), Fed. R. Crim. Proc., 18 U. S. C. Demangone did not produce his card at the trial but we should also point out that there was no identification by Watson.

II

A. Demangone also contends that his failure to carry his Notice of Classification (SSS Form 110) is not a crime. Section 1623.5, 32 CFR requires that a registrant keep in his "personal possession at all times" his Notice of Classification issued to show his current classification. His failure to comply with this regulation is a crime under 50 U. S. C. App. § 462. The requirement for possession is one which, as indicated in *Zigmund v. Selective Service Local Board No. 16*, 396 F. 2d 230 (1st Cir. 1968) punishes wilful noncompliance. We have concluded as did the District Judge that Demangone publicly transferred possession of his SSS Form 110 contrary to the requirement of "personal possession at all times." See *United States v. Cumming*, 445 F. 2d 555 (1st Cir. 1971). We adopt the view expressed by the First Circuit.

B. Demangone insists that he cannot be prosecuted under Section 12(a) of the Military Selective Service Act, 50 U. S. C. App. § 462(a), for failure to have his SSS Form

110 in his personal possession at all times. The thrust of his argument is that since Section 12(b)(6), 50 U. S. C. App. § 462(b)(6) speaks directly to knowing violations of a regulation involving possession, that Section 12(a) which covers failure to comply with Selective Service regulations generally is superseded by the more specific Section 12(b)(6).

A registrant's non-possession of SSS Form 110 is clearly a crime under the wording of either Section 12(a) or Section 12(b)(6). In *United States v. O'Brien*, 391 U. S. 367,380 (1968) the Court spoke on the issue of alternative statutory avenues of prosecution, holding that Congress can properly employ such alternatives, if the alternatives are not used concurrently creating multiple punishment. The Government has chosen to prosecute Demangone only under Section 12(a). Since violation of 32 CFR § 1623.5 is a crime under Section 12(a), we see no reason why that approach may not be used while ignoring an alternative route under Section 12(b)(6), regardless of the latter's greater specificity.

C. Demangone contends that since he was improperly classified as 1-A, *United States v. Demangone*, 419 F. 2d 762 (3 Cir. 1969), he was not required to have in his possession a Notice of Classification (SSS Form 110) "showing his current classification." Demangone's argument is a semantical one. He seems to take the position that the phrase "*valid* Notice of Classification" (emphasis added), should be read as "a Notice of *valid* Classification." All that is meant by 32 CFR § 1623.5 is that the registrant shall have in his possession a certificate that is authentically issued and properly executed by the local board.

D. Two other points raised by Demangone, *viz.*, that the Act could not authorize the enacting of Regulation 1623.5 and that the "Liberty Clause" of the Fifth Amendment protected Demangone from the requirement of having in his personal possession the Notice of Classification, were not raised in the District Court. But in any event they are without merit.

The judgment of conviction will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit.

Military Selective Service Act of 1967 50 U. S. C. App. 462(a)

Sec. 12. *Penalties.*—(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to

commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title unless such person has been actually inducted for the training and service prescribed under this title or unless he is subject to trial by court martial under laws in force prior to the enactment of this title. Precedence shall be given by courts to the trial of cases on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

Military Selective Service Act of 1967

50 U. S. C. App. 462(b)

"Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of non-residence, or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, knowingly destroys, any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate, purporting to be a certificate issued pursuant to this title, or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall upon conviction, be fined not to exceed $10,000.00 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury."

Selective Service Regulation

(32 C. F. R. 1623.5)

1623.5 PERSONS REQUIRED TO HAVE NOTICE OF CLASSIFICATION (SSS FORM 110) IN PERSONAL POSSESSION.—Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate (SSS Form 2), a valid Notice of Classification (SSS Form 110) issued to him showing his current classification. When any such person is inducted into the armed forces or enters upon active duty in the armed forces, other than active duty for training only or active duty for the sole purpose of undergoing a physical examination, he shall surrender his Notice of Classification (SSS Form 110) to the commanding officer of the joint examining and induction station or to the responsible officer at the place to which he reports for active duty, who shall destroy such notice.

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No. 71-1258

In the Supreme Court of the United States

OCTOBER TERM, 1971

LAWRENCE DAMANGONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of willful failure to keep his classification notice (SSS Form 110) in his possession, in violation of 50 U.S.C. App. 462(a). He was sentenced to six months' imprisonment and two and a half years' probation on the condition that he engage in work in the national interest during the probationary period; and he was fined $3,000. The court of appeals affirmed. (Pet. App. 8a).

Petitioner registered with his local board on May 7, 1964, and received II-S student deferments until February 13, 1968, when he was reclassified I-A.

Petitioner was ordered to report for induction on June 11, 1968, but refused induction. He was convicted

466-162—72 —1

of refusing induction on October 16, 1968, but the court of appeals reversed the conviction (419 F. 2d 762 (C.A. 2)), entering final judgment on February 27, 1970.

On March 17, 1970, petitioner was reclassified I-A and mailed a classification card (SSS Form 110) on March 18, 1970. (Tr. 17).[1] He was subsequently ordered to report for induction on May 19, 1970 (Tr. 18), but he failed to report.

On June 11, 1970, an agent of the Federal Bureau of Investigation interviewed petitioner regarding possible selective service violations. During the course of that interview, petitioner stated that he did not have his classification card (SSS Form 110) in his possession (Tr. 88) and that he had given the card to a named speaker at a peace rally on April 15, 1970 (Tr. 88). The present indictment, trial and conviction followed.[2]

Petitioner contends here that 32 C.F.R. 1623.5 requiring him to possess a classification card, is an invasion of his liberty without due process of law.[3] However, petitioner has not demonstrated that requiring him to possess a classification card subjects him to any substantial interference with his liberty and we sub-

[1] "Tr." references are to the transcript of the proceedings below which are a part of the record filed with the Clerk of this Court.

[2] The second count of the indictment, charging petitioner with failure to report for induction into the Armed Forces, was dismissed by the district court. (Pet. App. 5a).

[3] This argument was not raised at the district court level, and therefore, it should not be reviewed by this Court in the absence of exceptional circumstances. See *Hormel* v. *Helvering*, 312 U.S. 552.

mit that it does not. This Court in *United States* v. *O'Brien*, 391 U.S. 367, 377–378, recognized that "The issuance of certificates indicating the * * * eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system," and that "legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration." All courts considering this regulation have upheld it against constitutional attack.[4]

Petitioner also contends here, as he did below, that if non-possession of his classification card is a crime, it is only a crime under Section 12(b)(6), which provides penalties for violation of "regulations, * * * relating to * * * possession of [classification] certificate[s]," and not under Section 12(a), which establishes the same penalty for the knowing refusal "to perform any duty required * * * [by the selective service] regulations." However, the regulation that petitioner violated, 32 C.F.R. 1623.5, creates a single duty: to carry the classification certificate. Sections 12(b)(6) and 12(a) simply provide, in different language, the same penalty for violation of that single duty.[5] This

[4] See *United States* v. *Kime*, 188 F.2d 677 (C.A. 7), certiorari denied, 342 U.S. 823; *United States* v. *Taylor*, 442 F.2d 1327 (C.A. 9); *United States* v. *Branigan*, 299 F. Supp. 225 (S.D. N.Y.); *United States* v. *Hertlein*, 143 F. Supp. 742 (E.D. Wisc.).

[5] See *United States* v. *Couming*, 445 F.2d 555 (C.A.1), certiorari denied, 404 U.S. 949 (prosecution for non-possession under Section 12(a)); see also *United States* v. *Branigan*, 299 F. Supp. 225, 230 (S.D. N.Y.), in which the court said:

"That earlier prosecutions for non-possession may have been grounded on subsection (b) and not on subsection (a) of section 12 is of no significance; subsection (a) is broad enough

Court in *United States* v. *O'Brien*, *supra*, 391 U.S. at 380, spoke on the issue of alternative avenues of prosecution, holding that Congress can employ such alternatives, if the alternatives are not used concurrently creating multiple punishment. And here there is no claim of multiple punishment.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

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to permit prosecution for the offense here alleged. The choice of subsection to be used rests with the prosecutor."